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Opinion No. 12-78

Municipal Administrative Hearing Officer Act

QUESTION

Does the Municipal Administrative Hearing Officer Act, codified at Tenn. Code Ann. §§ 6-54-1001 to -1018, violate due process standards established by the United States and Tennessee Constitutions?

OPINION

No.

ANALYSIS

The Municipal Administrative Hearing Officer Act (the "Act") authorizes municipalities to create by ordinance the office of administrative hearing officer to adjudicate building and property maintenance code violations. Tenn. Code Ann. § 6-54-1001. In municipalities passing such an ordinance, a municipal officer issues a citation to the alleged violator and then transmits the citation to the administrative hearing officer. Tenn. Code Ann. § 6-54-1008. Upon receipt of the citation from the issuing officer, the administrative hearing officer makes an initial determination whether a violation exists. Tenn. Code Ann. § 6-54-1009(a). If the administrative hearing officer determines a violation exists, he or she may set a fine and a reasonable period of time for the alleged violator to remedy the violation. Tenn. Code Ann. § 6-54-1009(a) & (b). Upon written request of the violator, the administrative hearing officer shall conduct a hearing on the citation. Tenn. Code Ann. § 6-54-1009(c) & (d).

The question posed is whether the administrative process established by the Act satisfies due process standards established by the United States and Tennessee Constitutions. The Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 8 of the Tennessee Constitution provide similar procedural protections and guarantees. *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997); *Eye Clinic, P.C. v. Jackson–Madison County Gen. Hosp.*, 986 S.W.2d 565, 578 (Tenn. Ct. App. 1998). Both provisions established procedural protections for property and liberty interests against arbitrary governmental interference. *Armstrong v. Department of Veterans Affairs*, 959 S.W.2d 595, 598 (Tenn. Ct. App. 1997). While they contain a guarantee of fair process, they do not prevent the deprivation of property or liberty interests. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990); *Daniels v. Williams*, 474 U.S. 327, 337 (1986). Rather, procedural due process guards against unfair or mistaken deprivations. *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972).

The threshold consideration with regard to any procedural due process claim is whether the plaintiff has a liberty or property interest that is entitled to due process protection. *Rowe v. Board of Educ*., 938 S.W.2d 351, 354 (Tenn. 1996); *Armstrong*, 959 S.W.2d at 597–98. With respect to fines, courts have found that the imposition of a fine is a sufficient property interest to support a procedural due process claim. *See Herrada v. City of Detroit*, 275 F.3d 553, 556 (6th Cir. 2001); *Hlad v. Tennessee Secondary Sch. Athletic Assoc.*, 305 F.Supp. 2d 830, 835 (M.D. Tenn. 2004). Thus, a person who receives a citation setting forth a fine for a building or property maintenance code violation, pursuant to Tenn. Code Ann. § 6-54-1009, is entitled to procedural due process protection.

"[D]ue process requires the opportunity of the party charged to be heard at a meaningful time and in a meaningful manner, before an impartial tribunal." *Cooper v. Williamson County Bd. of Educ.*, 803 S.W.2d 200, 202 (Tenn. 1990). A fair trial before an impartial tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136 (1955). This requirement applies to administrative proceedings as well. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Martin v. Sizemore*, 78 S.W.3d 249, 263-64 (Tenn. Ct. App. 2001).

Due process does not, however, require that an administrative tribunal be completely unfamiliar with the factual issues presented at a hearing. Administrative decision-makers, like judicial ones, are entitled to a "presumption of honesty and integrity." *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Jones v. Greene*, 946 S.W.2d 817, 825 (Tenn. Ct. App. 1996). The mere combining of investigative and adjudicative functions in an administrative board or hearing officer "does not, without more, constitute a due process violation." *Withrow*, 421 U.S. at 58. *See Martin*, 78 S.W.3d at 264 (stating that some combination or overlapping of functions in an administrative proceeding is not inconsistent with fundamental fairness).

Accordingly, a party basing a procedural due process claim on a claim that the hearing officer possesses both investigative and adjudicative functions must demonstrate that the risk of actual bias is intolerably high, not merely that a combination of these functions exists. *Withrow*, 421 U.S. at 58; *Martin*, 78 S.W.3d at 265. The types of cases where actual bias may be found are generally categorized as those in which the decision-maker (1) has a pecuniary interest in the outcome of the case, (2) has been the target of personal abuse or criticism from the parties seeking the decision-maker's disqualification, (3) is directly involved in other matters concerning the litigation, or (4) may have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decision-maker. *Hookason v. Jones*, 757 S.W.2d 347, 349 (Tenn. Ct. App. 1988) (citing *Withrow*, 421 U.S. at 47).

As previously stated, under the Act the hearing officer has several responsibilities. The officer upon receipt of a citation determines if a violation exists. If a violation is found, the officer may impose a fine and set a reasonable time for payment of the fine, and the officer is required to conduct a hearing if requested in writing by the person committing the violation. Tenn. Code Ann. § 6-54-1009. Under this statutory scheme, an administrative hearing officer does not cease to be an impartial decision-maker simply by virtue of making an initial determination that a building or property maintenance violation exists. The administrative hearing officer's initial determination is tantamount to a "show cause" order that notifies the

alleged violator of the issue to be resolved at the hearing. The administrative hearing officer's initial determination that a violation exists, based upon a citation received from the issuing officer, merely reflects that the citation is sufficient to impose a fine if the alleged violator does not refute the violation in the citation at a hearing. In similar instances, courts have found that an administrative hearing officer's making such a determination does not automatically preclude the administrative hearing officer's further participation in the proceedings. *See, e.g.*, *Morris v. City of Danville*, 744 F.2d 1041, 1044-46 (4th Cir. 1984) (fact that city manager made initial conditional decision to terminate the police chief pending further administrative developments did not constitutionally disqualify him as ultimate decision-maker on the ground of bias); *Harless v. City of Kingsport*, No. 03A01-9707-CH-00289, 1998 WL 131519 (Tenn. Ct. App. March 25, 1998) (building official serving as both investigator and hearing officer did not result in denial of due process). *See also Withrow*, 421 U.S. at 47 (mere exposure to evidence presented in nonadversary investigative procedures was insufficient in itself to impugn fairness of administrative board members at later adversary hearing).

Furthermore, the Act erects various processes to ensure the ultimate impartiality of the hearing officer. For example, the administrative hearing officer is not permitted to "communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any person without notice and opportunity for all parties to participate in the communication," unless required for the disposition of *ex parte* matters specifically authorized by statute. Tenn. Code Ann. § 6-54-1003(a). An administrative hearing officer also may only communicate with municipal employees or officials regarding a matter pending before the administrative body or receive aid from staff assistants, members of the staff of the city attorney or a licensed attorney, if such persons do not receive *ex parte* communications of a type that the administrative hearing officer would be prohibited from receiving, and do not furnish, augment, diminish or modify the evidence in the record. Tenn. Code Ann. § 6-54-1003(b). Further, unless required for the disposition of *ex parte* matters specifically authorized by statute, no party to a contested case and no other person may communicate, directly or indirectly, in connection with any issue in that proceeding, while the proceeding is pending, with any person serving as an administrative hearing officer without notice and opportunity for all parties to participate in the communication. Tenn. Code Ann. § 6-54-1003(c).

Nor does the compensation of the officer appear to be impacted by his or her decisions, a factor which if it existed could implicate due process concerns. An administrative hearing officer is appointed by the local governing body for a four-year term and serves at the pleasure of the appointing governing body. Tenn. Code Ann. § 6-54-1006(a).[1] The administrative hearing officer is not an employee of the municipal department that oversees compliance with the municipality's building and property maintenance codes. Therefore, the administrative hearing officer's decisions do not appear to affect personal compensation or otherwise personally benefit him or her. *See Tumey v. Ohio*, 273 U.S. 510, 532-33 (1927) (bias exists for disqualifying a hearing officer when the decision maker has strong institutional responsibilities requiring him or her to rule in the institution's favor); *Martin*, 78 S.W.3d at 266 n. 4 (there is a natural suspicion that adjudicators will act favorably toward their employers).

[1] "A municipality may also contract with the administrative procedures division, office of the Tennessee secretary of state to employ an administrative law judge on a temporary basis to serve as an administrative hearing officer." Tenn. Code Ann.§ 6-54-1006(c).

In sum, in the absence of actual bias being demonstrated in a particular case, an alleged violator's due process rights are not violated merely because an administrative hearing officer reviews the citation, makes a determination that a violation exists, and then conducts a hearing on the citation.

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